Act.[34] No provision had yet been made as to age, so that until 1837 an infant of fourteen might make a will of personalty. Section 7 of the Wills Act provided that no will by a person under twenty-one should be valid,[35] and section 11 provided that a soldier in actual service might bequeath his personal estate as he might before the making of the act.[36] If the section is read literally, an infant soldier may certainly bequeath his personalty. But it is in the form of a proviso, and it is believed that it is intended to qualify only the sections immediately preceding which deal with execution. That this is true is indicated by the fact that the section is taken from the Statute of Frauds [37] which made no provision as to age, and, moreover, by the very reasons underlying the privilege. The situation of the soldier may make proper execution difficult, but it can hardly increase his discretion. Furthermore, the Report of the Real Property Commissioners, upon which the Wills Act is based, indicates that it was not intended to extend the privilege to infants.[38] There is a square American decision under a very similar statute which accords with this view.[39] Although the section was borrowed from the civil law,[40] it affords little aid in construing the statute. It is true that Augustus permitted soldiers still subject to the *patria potestas* to make their wills as if *sui juris*,[41] but in continuing this rule Justinian required that such soldiers should comply with all the usual formalities of execution.[42] No trace of such a special privilege to infant soldiers has been found in the modern civil law.

In the present state of the authorities it may fairly be said that the question is still *res integra* in England. It is to be hoped that, if the question arises squarely for decision, the English court will hold such a will invalid.[43]

DISCRIMINATION BY A NATURAL GAS COMPANY. — It is axiomatic that, ordinarily, a public service company must extend its facilities to

[34] See 29 CAR. II, c. 3, § 23: "Provided always, that notwithstanding this Act, any soldier being in actual military service, . . . may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act."

[35] See 1 VICT. c. 26, § 7.

[36] See 1 VICT. c. 26, § 11: "Provided always, and be it further enacted, that any soldier being in actual military service, . . . may dispose of his personal estate as he might have done before the making of this Act."

It is to be noted that the language of this section does not so clearly qualify *all* the provisions of the Act as the corresponding section of the Statute of Frauds.

[37] See *In re* Limond, [1915], 2 Ch. 240, 248.

[38] FOURTH REPORT OF THE REAL PROPERTY COMMISSIONERS, 22, 23 (1833).

[39] Goodell *v.* Pike, 40 Vt. 319 (1867).

[40] See Drummond *v.* Parish, 3 Curt. Eccl. 522, 531 (1843). It appears from the preface to the life of Sir Leoline Jenkins, who was instrumental in preparing the Statute of Frauds, that he took considerable credit to himself for having secured to English soldiers the same privilege in bequeathing their property as that enjoyed by the Roman soldiers.

[41] See MUIRHEAD, ROMAN LAW (2 ed.), 322. This was later extended by Hadrian to those who had obtained an honorable discharge. *Ibid.*

[42] See INST. JUST., Lib. II, tit. XI. "*Sed testari quidem, etsi filiifamiliarum sunt, propter militiam concedunter, jure tamen communi, eadem observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum proxime exposuimus.*"

[43] This result may well be deemed undesirable, but the remedy, of course, is with Parliament.

meet reasonable demands. The interests of the public generally, rather than those of the company, are the deciding factor in determining what extensions should be made. The company must perform that which is, under all the circumstances, a reasonable service.[1]

A company, engaged in the business of distributing water for irrigation purposes, is a public service company at common law and is subject to all the duties of public service.[2] But where there are natural limitations on its supply, it is compelled to take on consumers only up to the capacity of its system. Consumers of the normal supply are primary consumers and are equal in right; if there is any deficiency, the primary consumers must pro-rate.[3] When the normal supply is fully devoted to primary consumers, additional or secondary consumers may demand any surplus,[4] but cannot be admitted to the normal supply,[5] even though more favorably situated than a primary consumer.[6] A primary consumer may enjoin the company from admitting an additional consumer to the normal supply, when it is already devoted to primary consumers.[7] This is worked out under the general rule that a public service company must furnish the public a reasonable service equally and without discrimination.[8]

It is difficult to see why the same results should not be reached in the case of a company distributing natural gas.[9] Such a company, like the irrigation company, is a public service company,[10] engaged in the distribution of an article, upon the supply of which there are natural limitations. As in the irrigation cases, the interesting problem arises where a

---

[1] Birmingham Water Works Co. *v.* Birmingham, 176 Ala. 301, 58 So. 204 (1912); Root *v.* New Britain Gaslight Co., 91 Conn. 134, 99 Atl. 559 (1916). *Cf.* Covington, etc. R. Co. *v.* Sandford, 164 U. S. 578, 596 (1896).

[2] San Diego Land & Town Co. *v.* Sharp, 97 Fed. 394 (C. C. A.) (1899); Osborne *v.* San Diego Land & Town Co., 178 U. S. 22 (1900); Gould *v.* Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904); Salt River Valley Canal Co. *v.* Nelssen, 10 Ariz. 9, 85 Pac. 117 (1906); Crow *v.* San Joaquin Irrigation Co., 130 Cal. 309, 62 Pac. 562, 1058 (1900); Wheeler *v.* Northern Colo. Irrigating Co., 10 Colo. 582, 17 Pac. 487 (1888); Colorado Canal Co. *v.* McFarland and Southwell, 50 Tex. Civ. App. 92, 109 S. W. 435 (1908).

[3] Holman *v.* Pleasant Grove City, 8 Utah, 78, 30 Pac. 72 (1892); Souther *v.* San Diego Flume Co., 121 Fed. 347 (C. C. A.) (1903). *Cf.* Larimer & Weld Irrigation Co. *v.* Wyatt, 23 Colo. 480, 48 Pac. 528 (1897).

[4] Green Valley Ditch Co. *v.* Schneider, 50 Colo. 606, 115 Pac. 705 (1911).

[5] Gerber *v.* Nampa & Meridian Irr. Dist., 16 Idaho, 1, 100 Pac. 80 (1908). See Gould *v.* Maricopa Canal Co., 8 Ariz. 429, 450, 76 Pac. 598, 601 (1904).

[6] San Diego Land & Town Co. *v.* Sharpe, 97 Fed. 394 (C. C. A.) (1899).

[7] Wyatt *v.* Larimer & Weld Irrigation Co., 18 Colo. 298, 33 Pac. 144 (1893); Lanning *v.* Osborne, 76 Fed. 319 (C. C. A.) (1896), (affirmed, Osborne *v.* San Diego Land & Town Co., 178 U. S. 22). *Contra*, Bank of California *v.* Fresno Canal & Irrigation Co., 53 Cal. 201 (1878).

[8] See 2 WIEL, WATER RIGHTS (3 ed.), §§ 1279–87.

[9] In the irrigation cases the courts talk about "appropriation" and "water rights," and of course the results in those cases were originally reached through water law combined with the law of public-service companies. However, it is submitted that, where there is a company supplying a natural product through conduits to a large number of consumers, the problem is, in substance, the same, whether that natural product be water or gas. For a concise, non-technical presentation of the different doctrines of water law in this country, see Pound, "Irrigation Law," 5 AMER. L. & PROC. 363.

[10] Bloomfield, etc. Natural Gaslight Co. *v.* Richardson, 63 Barb. 437 (1872); Charleston Natural Gas Co. *v.* Low, 52 W. Va. 662, 44 S. E. 410 (1901); Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17 (1897).

connection is demanded after the company has already contracted up to its normal supply; but the only court which has passed squarely upon this question has reached a result opposite to that in the irrigation cases. In *State ex rel. Wood* v. *Consumers Gas Trust Co.*,[11] it was held that a new consumer must be "permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it." This decision has been the subject of criticism.[12] The authorities cited by the court do not support the decision. There are two elements in the duty of the company: (1) reasonable service, (2) no discrimination. The court evidently concentrated its attention on the latter and lost sight of the former.[13] As in the irrigation cases, it is a reasonable service to the primary consumers to limit the number of consumers to the available supply of gas. Any other rule is thoroughly unsatisfactory. Such discrimination as there is under this rule is fully justified under the circumstances. It is not discrimination in itself that is objectionable, but only discrimination which is not based on any reason. Suppose there is a temporary car shortage. There are only ten cars available. A hundred shippers apply for cars, and each must have at least one car to make it worth while. Should the carrier be compelled to say to them, "You can have one-tenth of a car each"? Rather, the first ten applicants should get the cars. Similarly, if there is a natural gas company having only a hundred units of gas normally available, the first hundred applicants should be connected and these primary consumers should have equal rights;[14] but they should not be subjected to unreasonable diminution by further connections. If the company is compelled to connect all who apply, the service may become totally worthless to all consumers. Such a result is hardly consonant with the primary duty of the company to furnish a reasonable service.

It is not suggested that the natural gas company may, in the first instance, discriminate between patrons. It cannot give its directors or stockholders, as such, a preference over the general public,[15] nor can it undertake to give all its supply to one consumer.[16] This is further

[11] 157 Ind. 345, 61 N. E. 674 (1901). This case was followed in Indiana Natural Gas Co. *v.* State *ex rel.* Armstrong, 162 Ind. 690, 71 N. E. 133 (1904). See 15 HARV. L. REV. 571.

[12] "A rule which may result in satisfactory service to none, not even to the applicant in question, is hardly consistent with public service to all." 1 WYMAN, PUBLIC SERVICE COMPANIES, § 653.

[13] A similar error was made in United Fuel Gas Co. *v.* Public Service Commission, 73 W. Va. 571, 80 S. E. 931 (1914). The natural gas company had established a rate of 23 cents a thousand cubic feet for its "no contract" consumers, while charging those who signed a five-year exclusive contract, 22 cents. The court held that this was undue discrimination. It would seem that there are essentially two different services performed, and the authorities seem to allow a discrimination in rates based on such differences in service. Graver *v.* Edison Electric Illuminating Co., 126 App. Div. 371, 110 N. Y. Supp. 603 (1908); Steinman *v.* Edison Electric Illuminating Co., 43 Pa. Super. Ct. 77 (1910); Beck *v.* Indianapolis Light & Power Co., 36 Ind. App. 600, 76 N. E. 312 (1905); Souther *v.* Gloucester, 187 Mass. 552, 73 N. E. 558 (1905); St. Louis Brewing Ass'n *v.* St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911 (1896).

[14] Fairchance Window Glass Co. *v.* Star Gas Co., 66 Leg. Int. (Pa.) 409 (1908).

[15] Crescent Steel Co. *v.* Equitable Gas Co., 23 Pitts. Leg. J. (N. S.) 316 (1892).

[16] "The defendant [natural gas] companies are public service corporations, having

evidence of the similarity between the natural gas and the irrigation companies. The irrigation company cannot grant exclusive rights,[17] nor undertake to give its entire supply to one consumer.[18]

A recent case [19] has arisen, where, although the supply of gas was normally more than adequate, the company was unable to supply the abnormal demands made by the consumers during a period of fifteen or twenty days of extremely cold weather. The court, considering the short duration of the period of deficiency and without deciding the question presented in *State ex rel. Wood* v. *Consumers Gas Trust Co.*,[20] ordered the company to give to the relator the connection which he sought.[21] This result seems sound. The real dispute in these cases is between the old consumers and the new one. Here the old consumers were demanding an unusual amount of gas for this short period. As between them and the new consumer, this was an unreasonable demand. It is only where the new consumer is cutting into the normal supply of the old one that the result in *State ex rel. Wood* v. *Consumers Gas Trust Co.*[22] becomes objectionable.

RECENT CASES

BAILMENTS — BAILEE AND THIRD PERSONS — RIGHT OF BAILEE TO RECOVER FULL DAMAGES FROM SURETY OF CONVERTER. — The defendant was surety for $2,000 on a postal employee's bond which was conditioned on his accounting for all property which came into his hands as clerk. The employee stole $15,000. The government, though its own liability to the owner was limited to $50, sued for the full amount of the bond. *Held*, that the govern-

---

the right of eminent domain, bound to furnish gas to consumers along their lines and within their respective districts . . . under ordinary rules of law applying to public service corporations in general. From the very nature of the source of supply this cannot mean that they are bound to furnish all consumers along their lines with all the gas they might require, but only that they shall furnish whatever gas they have to all who desire to become consumers along their lines, with a reasonable degree of equality. While it has not yet been held that a contract by which a natural gas company would undertake to give all its supply to one consumer is void as against public policy, such a contract certainly tends to encourage, if not to compel, the gas company to default in its duties to the general public, and is therefore not to be favored." *Per* Shafer, J., in Clairton Steel Co. *v.* Manufacturers Light & Heat Co., 240 Pa. 427, 438, 87 Atl. 998, 1002 (1913).

[17] Leavitt *v.* Lassen Irrigation Co., 157 Cal. 82, 106 Pac. 404 (1909.)

[18] Sammons *v.* Kearney Irrigation Co., 77 Neb. 580, 110 N. W. 308 (1906).

[19] Park Abbott Realty Co. *v.* Iroquois Natural Gas Co., 168 N. Y. Supp. 673 (1918). See Recent Cases, page 000.

[20] 157 Ind. 345, 61 N. E. 674 (1901).

[21] The relator applied for the connection before building the house and before the period of shortage. Upon the happening of the shortage, the Public Service Commission ordered the gas company to make no more connections, and, relying on this order, the company refused the connection to the relator when he completed his house. The court, in making its decision, considers the element of estoppel. However, it is evident that such consideration can have no weight. Estoppel could at best give the relator a merely private right, which could not be the foundation of a writ of mandamus.

[22] *Supra*, note 20.